

STATE OF TENNESSEE

Office of the Attorney General



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July 7, 2021

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Re: Administrative Action Related to *Bostock v. Clayton County*

Dear Mr. President,

As you are aware, State Attorneys General play a critical role in preserving federalism and the balance of power among the states and the federal government. Two recent actions by the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Education (ED) threaten to impose unlawful regulatory guidance upon nearly every employer and educational facility in our states and throughout the country. First, on June 15, 2021, EEOC Chairwoman Burrows published a guidance document regarding the EEOC's interpretation of *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 173 (2020) and its effect on EEOC's enforcement of Title VII. *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, NVT A 2021-1, June 15, 2021. Second, on June 16, 2021, ED issued a Notice of Interpretation indicating that it intends to enforce Title IX in the same manner. 86 Fed. Reg. 32,637 (June 16, 2021). In each instance, the agency misconstrued federal law and failed to adhere to the transparency and deliberative process required by the Administrative Procedure Act (APA).

At the beginning of your administration, you issued Executive Order 13,988 directing the heads of executive agencies to, among other things, promulgate new rules to implement statutes that prohibit sex discrimination. We had expected, following the issuance of Executive Order 13,988, that States and the public would have the opportunity to engage in the statutorily provided regulatory and public comment process in response to agency efforts to implement the Administration's policy of "prevent[ing] and combat[ing] discrimination on the basis of gender identity or sexual orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021). Instead, the States and other affected institutions and individuals have been excluded from any discussion. We write this letter to state our objections.

We begin with the EEOC guidance document. The document appears to have been issued unilaterally by Chairwoman Burrows without the input or approval of the other Commissioners. There was no notice to the public that such guidance was contemplated. There was no formal meeting of the Commission, which would have been open to the public and subject to public participation. Nor did the Commission vote on whether to issue the guidance. The document simply appeared and gave the imprimatur of the federal government to a radically inaccurate construction of Title VII.

The EEOC's purported "guidance" fundamentally misconstrues and improperly extends *Bostock*. The Court in *Bostock* narrowly addressed employment termination and explicitly refrained from addressing "sex-segregated bathrooms, locker rooms, and dress codes." 140 S. Ct. at 1753; *see also* U.S. Dep't of Justice, Application of *Bostock v. Clayton County*, at 4 (Jan. 17, 2021) ("*Bostock* does not require any changes to . . . sex-specific facilities or policies."). *Bostock* holds that an employer cannot fire a man who identifies as a woman if the employer would not fire a similarly situated woman who identifies as a woman. 140 S. Ct. at 1741. A significantly different balance of interests distinguishes a man identifying as a woman from a man showering with women coworkers. If anything, *Bostock*'s logic confirms that separate showers and locker rooms for men and women are lawful since differentiating facilities based on sex does not involve treating an employee "worse than others who are similarly situated." 140 S. Ct. at 1740.

Similarly, *Bostock* did not provide any basis for a claim that using biologically accurate pronouns could violate the law. To the contrary, the First Amendment protects the right to ascribe pronouns to others based on their sex. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). With respect to pronouns, the EEOC's guidance comes across as an effort to leverage the authority of the federal government to chill protected speech disfavored by your administration.

In addition, some gender dysphoric or transgender individuals prefer novel pronouns to the traditional masculine or feminine pronouns. *See United States v. Varner*, 948 F.3d 250, 256-57 (5th Cir. 2020) (declining to use a litigant's "preferred pronouns" and providing a chart of preferred pronouns that includes "such neologisms" as fae/faer/faers/faerself, per/per/pers/perself, ve/ver/vis/verself, and xe/xem/xyr/xyrself, ze/hir/hirs/hirself). Nothing about *Bostock*'s reasoning suggests that an employer would violate Title VII by refusing to adopt an employee's nontraditional pronouns.

The EEOC guidance also appears to ignore two of three protections provided to religious employers, acknowledging the Religious Freedom Restoration Act (RFRA) but nothing else. *Bostock* recognized that three religious liberty protections limit its scope: RFRA, Title VII's express statutory exception for religious organizations, and the First Amendment's protections of "the employment relationship between a religious institution and its ministers." *Bostock*, 140 S. Ct. at 1754. In fact, *Bostock* acknowledged that it does not change Title VII's exemption for religious organizations in 42 U.S.C. § 200e-1(a). *Id.* Moreover, RFRA may provide protections for employers—or their employees—that do not qualify for any of the Title VII religious exemptions. *Id.* Finally, *Bostock* is a statutory decision and cannot overrule the First Amendment's guarantees of religious liberty.

In sum, the EEOC's guidance constitutes a misstatement of the law that cannot be supported by the *Bostock* decision.

The Department of Education's so-called Notice of Interpretation fares no better. It goes far beyond interpreting Title IX and instead seeks to rewrite it. 86 Fed. Reg. 32,637 (June 16, 2021). In the ordinary course of governing, interpretative rules, non-legislative rules, and guidance are generally exempt from the notice-and-comment requirements of the APA, 5 U.S.C. § 553(b)(A). The function of these non-legislative rules or guidance documents is "to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir., 1987). However, the label an agency attaches to its actions is not dispositive. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *Brock v. Cathedral Bluff's Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986); *Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980).

The latest action is a "Notice of Interpretation" in name only. In reality, ED is attempting to rewrite Title IX and impose significant new obligations on educational institutions without adhering to any of the required procedures. The "Notice of Interpretation" represents a 180-degree change from the position taken by ED on the exact same issue just five months earlier. *See* U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Jan. 8, 2021) (<https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>). This abrupt pendulum swing, based on nothing more than the agency's say-so, creates regulatory confusion and deprives regulated parties of the due process protections afforded by the federal rule-making process. Although labeled a "Notice of Interpretation," this latest action by ED is entitled to no greater deference than other kinds of sub-regulatory guidance documents issued under different names. And the Supreme Court has made clear that such guidance documents "do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

The Notice of Interpretation is also substantively flawed. The Supreme Court expressly limited its decision in *Bostock* to Title VII. The Court emphasized that Title IX and "other federal or state laws that prohibit sex discrimination" were not "before" the Court and the Court did "not prejudge any such question" under those statutes. *Bostock*, 140 S. Ct. at 1753. "Title VII differs from Title IX in important respects," so "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *see also* U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), at 1-4 (Jan. 8, 2021) (acknowledging that *Bostock* did not construe Title IX and "does not affect the meaning of 'sex' as that term is used in Title IX").

There are significant textual differences between Title VII and Title IX. Title IX has successfully prevented discrimination and encouraged increased participation by girls and women in middle school, high school, and college athletics. The law has done so in large part by allowing recipients of Title IX funds to recognize the biological differences between male and female students. For example, the text of Title IX explicitly states that, "[n]otwithstanding anything to the contrary in this chapter, nothing contained herein shall be construed to prohibit any educational institution

receiving funds under this Act, from maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686. Similarly, Title IX recipients “may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 C.F.R. § 106.41(b). ED’s interpretation undermines rather than interprets Title IX: schools cannot “provide equal athletic opportunity for members of both sexes” if ED functionally forbids them from acknowledging that there are, in fact, two biologically distinct sexes. *Id.* § 106.41(c).

ED’s Notice of Interpretation states that the agency will “fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities.” 86 Fed. Reg. 32,637 (June 16, 2021). That interpretation is inconsistent with the text of Title IX and its implementing regulations, and it finds no support in *Bostock*. Title IX prohibits discrimination only “on the basis of sex.” 20 U.S.C. § 1681(a). In addition, Title IX squarely contradicts ED’s interpretation by explicitly allowing for differential treatment based on sex in some circumstances. *See, e.g.*, 20 U.S.C. § 1686. Moreover, *Bostock* held only that firing an employee because of the employee’s sexual orientation or transgender status constitutes discrimination on the basis of sex under Title VII. It did not address policies unrelated to employee hiring and firing—such as sex-separate facilities. Nor did it address Title IX at all. Neither the statute nor the case law cited by ED supports the agency’s expansive interpretation.

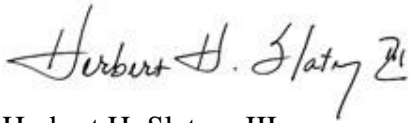
ED issued additional guidance on June 23, 2021, with a “Dear Educator” letter from Acting Assistant Secretary Suzanne B. Goldberg and a fact sheet on “Confronting Anti-LGBTQI+ Harassment in Schools” that further illustrated the breadth of ED’s purported application of *Bostock*. The fact sheet provides complex examples that conflate physical violence and verbal conduct, leaving ambiguity as to the scope of a school’s obligations under ED’s interpretation. The fact sheet implies that schools can be punished by the federal government because a student’s peers refer to that student by the student’s given name or with pronouns corresponding with that student’s sex. The fact sheet discusses bathroom access issues but avoids revealing your administration’s position with respect to teenagers using showers and locker rooms reserved for the opposite sex. By structuring its discussion as “examples of the kinds of incidents CRT and OCR can investigate,” the fact sheet is vague enough to leave significant questions unanswered but menacing enough to coerce many schools into quick capitulation with no guidance on what ED intends to enforce.

Far from providing guidance and clarity as to the state of the law, the recent actions of the EEOC and ED seek to rewrite the law without any of the procedural safeguards or democratic accountability required by our constitutional system. Further, ED’s application of Title VII precedent to Title IX raises significant questions in light of the EEOC guidance on Title VII. Schools are left to wonder whether, per the two documents, your administration will seek to punish them if they exclude boys who identify as girls from the girls’ showers and locker rooms after gym class. This is a matter of concern for millions of students and parents who appreciate the availability of private facilities for bathing and changing at school. They are entitled to an opportunity to be heard: we Americans are not passive recipients of the law, but rather active participants in the process of its creation and revision. In addition, schools must grapple with the contradiction between this bureaucratic guidance and the Constitution. Your agencies dictate that using the pronouns that correspond with a transgender person’s sex could be illegal, while the First

Amendment protects speakers who continue to use those pronouns. By unilaterally plunging ahead with these sweeping dictates, your administration harms the rule of law and undermines the legitimacy of these executive agencies.

As the chief legal officers of our states, Attorneys General have an obligation to represent the interests of our citizens and their institutions. The recent actions by the EEOC and ED flout required procedures and the rule of law and serve only to sow confusion among regulated entities—including the employers and schools that operate in our communities. We look forward to working with you to resolve these matters and appreciate your attention to the concerns presented here.

Sincerely,



Herbert H. Slatery III
Tennessee Attorney General & Reporter



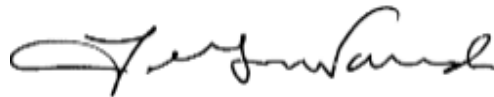
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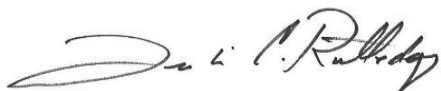
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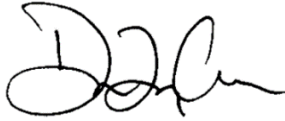
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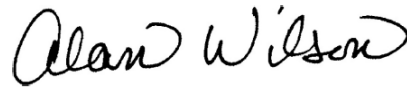
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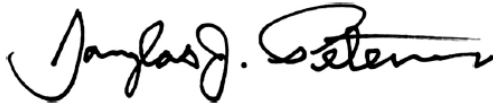
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